JAN 2 2014

Nos. 13-354 & 13-356

IN THE

Supreme Court of the United States

OCTOBER TERM 2013

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL., RESPONDENTS

CONESTOGA WOOD SPECIALTIES CORP., ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

---

BRIEF FOR THE CATO INSTITUTE *AS AMICUS CURIAE* IN SUPPORT OF THE *HOBBY LOBBY* RESPONDENTS AND THE *CONESTOGA* PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

KEVIN T. BAINE
Counsel of Record
EMMET T. FLOOD
C.J. MAHONEY
ELI SAVIT
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kbaine@wc.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether individuals who wish to conduct their business lives in accordance with their religious beliefs forfeit the right to do so when they organize their business in the form of a corporation, in particular a closely held corporation.

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1
INTRODUCTION AND SUMMARY OF ARGUMENT. 1
ARGUMENT 5
I. INDIVIDUALS EXERCISE THEIR RELIGION WHEN THEY ORDER THEIR PERSONAL AND PROFESSIONAL LIVES ACCORDING TO THEIR RELIGIOUS BELIEFS 5
II. INDIVIDUALS DO NOT FORFEIT THEIR RIGHT TO EXERCISE THEIR RELIGION IN THE WORKPLACE WHEN THEY SEEK THE BENEFITS OF INCORPORATION 6
A. A Corporation Can Only Act at the Direction of Human Beings 6
B. Individuals Often Engage in the Exercise of Religion When Managing Corporate Affairs 7
C. There Is Nothing Inherent in the Corporate Form that Requires Denial of the Personal Freedom to Direct the Affairs of a Corporation in Accordance with the Religious Beliefs of Its Owners 13
D. RFRA Protects the Free Exercise of Religion in the Corporate Setting 16
1. There is no indication that Congress intended to restrict the forms of free exercise that it protects 16
2. Interpreting RFRA to exclude free exercise rights in the corporate context would present serious constitutional questions 18
CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

Braswell v. United States, 487 U.S. 99 (1988) 14
Braunfeld v. Brown, 366 U.S. 599 (1961) 5, 8
Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) 13
Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989) 5
Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health and Human Servs., 724 F.3d 377 (3d Cir. 2013) 1
EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) 5
Employment Division v. Smith, 494 U.S. 872 (1990) 19
Hale v. Henkel, 201 U.S. 43 (1906) 15
Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) 1, 8, 18
Missouri Pac. R.R.. v. Boone, 270 U.S. 466 (1926) 19
Samantar v. Yousuf, 560 U.S. 305 (2010) 6
Sherbert v. Verner, 374 U.S. 398 (1963) 5
Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981) ..... passim
Wisconsin v. Yoder, 406 U.S. 205 (1972) 3

Statutes:

15 U.S.C. § 77*l*(a)(1), (2) 14
15 U.S.C. § 77q 14
18 U.S.C. §§ 1341 & 1343 14
18 U.S.C. § 1001 14
Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq. ..... passim

42 U.S.C. § 2000bb-1 ..... 6, 12
42 U.S.C. § 2000e(j) 13

Miscellaneous:

American Law Inst., *Principles of Corporate Governance: Analysis and Recommendations*: § 2.01 The Objective and Conduct of the Corporation (1994) 9, 10
Daniel J.H. Greenwood, *Enronitis: Why Good Corporations Go Bad*, 2004 Colum. Bus. L. Rev. 773 (2004) 10
Fact Sheets, *Chick-fil-A's Closed-on-Sunday Policy, available at* http://www.chick-fil-a.com/Pressroom/Fact-Sheets/sunday_2012 (last visited Jan. 23, 2014) 11
Gordon Cohn & Hershey H. Friedman, *Improving Employer-Employee Relationships: A Biblical and Talmudic Perspective on Management*, 40 Management Decision 955 (2002) 10, 11
Haider Ala Hamoudi, *Muhammad's Social Justice or Muslim Cant?: Langdellianism and the Failures of Islamic Finance*, 40 Cornell Int'l L.J. 89 (2007) 9
Jeff Benedict, The Mormon Way of Doing Business: Leadership and Success Through Faith and Family (2007) 12
Leviticus 25:14 9
Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. Rev. 387 (2003) 16

Mark Borden & Anya Kamenetz, *Timberland's Jeff Swartz on Corporate Responsibility*, FAST CO., September 1, 2008 11

Pope John Paul II, Centesimus Annus, *On The Hundredth Anniversary of Rerum Novarum* (1991) 10

Robert Steinbuch, *The Executive-Internalization Approach to High Risk Corporate Behavior: Establishing Individual Criminal Liability for the Intentional or Reckless Introduction of Excessively Dangerous Products or Services into the Stream of Commerce*, 10 N.Y.U. J. Legis. & Pub. Pol'y 321 (2007) 14

Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 Wash. & Lee L. Rev. 3 (2012) 7, 8

Tom Keane, *Without Jobs, It Won't Be The Same*, The Boston Globe, Aug. 30, 2011 7

William M. Fletcher Corporation Forms Annotated (5th ed. West 2014) 15

William M. Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* (perm. ed. rev. vol. 2006 & 2013-2014 Supp.) ..... passim

INTEREST OF AMICUS CURIAE[1]

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual Cato Supreme Court Review. This case concerns Cato because it implicates the fundamental right of individuals to manage their affairs in accordance with the dictates of their own consciences.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The issue in these cases is not whether a for-profit corporation has religious beliefs or enjoys on its own a right freely to exercise religion. That is the issue that divided the Third and Tenth Circuits. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013); *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health and Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013). The real issue in these cases is whether *individuals* who wish to conduct their business lives in accordance with their religious beliefs forfeit the right to do so when they organize their business in the form of a corporation—in particular, a closely held corporation.

---

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus made a monetary contribution its preparation or submission.

That question, *amicus* respectfully submits, answers itself. A corporation is a legal fiction created to foster economic activity; it is not a construct to shelter business conduct from the influence of religious faith and morals. There is nothing inherent in the corporate form that requires individuals seeking the civil protections of incorporation to surrender their personal right to exercise their religion in the way they conduct their business. And there is nothing to suggest that Congress, in passing legislation to broaden the protection of religious liberty, intended to restrict the religious liberties individuals enjoy in their business affairs based solely on how those affairs are organized under civil law. Indeed, there is at least a serious constitutional question whether Congress could exact a religious price upon those who seek the secular benefits of incorporation.

Whether a for-profit corporation can exercise religion is an interesting theoretical question. But there is no need to address that theoretical question when legislation regulating a corporation also restricts the religious liberty of the individuals who founded, own, and direct the affairs of that corporation.

These cases offer this Court an opportunity to clarify that compulsion directed towards a closely held corporation can amount to a substantial burden on the free exercise rights of its founder-owners when it compels them to direct the corporation's affairs in a manner that is contrary to their religious beliefs.[2]

2. The key fallacy in the government's argument to the contrary is its assumption that because a corporation

---

[2] That these cases involve closely held corporations is significant. In a publicly or widely held corporation, it may be harder to identify a religious belief attributable to ownership.

has a distinct legal status, there is no personal dimension to corporate decision-making—or, at least, none that is worthy of recognition. The reality, however, is that a corporation can act only at the direction of human beings. *See* 1 William M. Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* (perm. ed. rev. vol. 2006 & 2013-2014 Supp.) ("Fletcher Cyclopedia") § 5. Thus, in a real sense, any government compulsion directed at a closely held corporation is also felt by the individuals who created the corporation and direct its affairs.

These individuals do not check their religious values at the office door. Indeed, this Court has recognized repeatedly that an individual may "exercise" religion in virtually every phase of life. For many people, religion determines the school they attend, the food they eat, the person they marry, and the place they work. It dictates how they lead their lives, how they raise their children, and how they are mourned when they die. For that reason, this Court has declined to cabin free exercise rights to any particular activity. Instead, this Court has sensibly determined that people engage in the exercise of religion whenever their actions are "rooted in religious belief." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

Inevitably, a great deal of religiously motivated action occurs in the workplace. People of faith often order their professional lives in accordance with their beliefs, and individuals who control corporations are no exception. Indeed, corporate decision-makers are often faced with moral choices—ranging from wages to working conditions to competitive practices—that squarely implicate religious teachings. And when these officials believe they are bound by faith to steer their corporation in a particular direction, that action is plainly "rooted in" the *individual's* "religious belief." *Id.*

3. The government cannot force individuals to forfeit their free exercise rights when they incorporate a business—just as it cannot force individuals to forsake these liberties when they enter the workforce, attend school, or engage in any other secular pursuit. More to the point, there is nothing about the act of incorporation that amounts to a waiver of individual free exercise rights. And there is nothing in this Court's jurisprudence or in the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq. (RFRA), that requires an individual to surrender her right to conduct her business in accordance with her religious beliefs when she seeks the civil benefits of incorporation.

The fact is that the corporate form is an essential tool for operating successfully in the complex modern economy. The choice the government would put to devout businesspeople is, therefore, an untenable one: subject yourself to a severe competitive disadvantage by surrendering the protection of the corporate form (and maintain religious freedom), or incorporate (and lose the right to order your professional life in accordance with your faith).

Amicus therefore submits that the best and most straightforward way for the Court to approach these cases is to affirm that the right to "exercise" one's religion includes the freedom to implement one's religious beliefs in every phase of life, including one's work life—and that a law compelling action by a corporation can also amount to a substantial burden on the free exercise rights of those who create and control it. Such a holding would do no more than ensure that those individuals retain the same RFRA rights to exercise religion in their professional endeavors as they do in other aspects of their lives.

ARGUMENT

I. INDIVIDUALS EXERCISE THEIR RELIGION WHEN THEY ORDER THEIR PERSONAL AND PROFESSIONAL LIVES ACCORDING TO THEIR RELIGIOUS BELIEFS

"This Nation is heir to a history and tradition of religious diversity." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 589 (1989). That diversity manifests itself not just in the jumble of faiths and sects that flourish in America, but also in the various ways individual Americans exercise their religious beliefs. Some Americans compartmentalize their faith, "worship[ping] God on Sundays or some other chosen day and go[ing] about their business without reference to God the rest of the time." *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 624-25 (9th Cir. 1988) (Noonan, J., dissenting), *cert. denied*, 489 U.S. 1077 (1989). But many others believe that their religion requires far more than a periodic visit to a house of worship. Many religious people strive to "integrate their lives" with their faith, *id.*, and align their day-to-day activities with religious beliefs.

This Court's free exercise jurisprudence has always recognized this reality. In *Braunfeld v. Brown*, this Court entertained free exercise claims from Orthodox Jews whose "faith . . . require[d] the closing of their places of business . . . from nightfall each Friday until nightfall each Saturday." 366 U.S. 599, 601 (1961). In *Sherbert v. Verner*, it held that the government could not condition a Seventh-day Adventist's eligibility for unemployment benefits upon her willingness to work on the Sabbath in violation of her religious beliefs. 374 U.S. 398, 399 (1963). And in *Thomas v. Review Board of Indiana Employment Security Division*, the Court entertained a free exercise claim brought by Jehovah's Witness who had been discharged from his job because

his pacifist "religious beliefs forbade participation in the production of armaments." 450 U.S. 707, 709 (1981).

The outcomes of these cases differed: the Orthodox Jews in *Braunfeld* lost, whereas the Seventh-day Adventist in *Sherbert* and the Jehovah's Witness in *Thomas* prevailed. But in entertaining the free exercise claims in all of these cases, this Court recognized that the exercise of religion is not restricted to activity that takes place within chapel walls and that, for many religious people, the personal and professional spheres of life are inseparable.

II. INDIVIDUALS DO NOT FORFEIT THEIR RIGHT TO EXERCISE THEIR RELIGION IN THE WORKPLACE WHEN THEY SEEK THE BENEFITS OF INCORPORATION

The government contends, however, that individuals cannot exercise religion in their professional lives while acting on behalf of a corporation. Central to the government's position is the notion that human adherence to religious principles either does not occur or must be ignored in the context of corporate activity. Whichever way the idea is stated, it has no basis in the law or in reality.

A. A Corporation Can Only Act at the Direction of Human Beings.

A corporation "can act only through its agents"—*i.e.*, through the actions of individual human beings. Fletcher Cyclopedia § 5, at 3 (2013-2014 Supp.). To be sure, a corporation has separate legal status from the individuals who own and control it. But the very notion of corporate "personhood" is a "legal fiction." *Samantar v. Yousuf*, 560 U.S. 305, 315 (2010). This legal fiction is created to encourage economic activity—primarily by limiting the personal liability of individual investors.

And there is nothing in the concept of limited liability—or in the concept of corporate separateness generally—that excludes the human element in the direction of corporate affairs.

Indeed, the elements of human judgment are critical to the success of a corporation. In the real world, the acts of the fictional corporate "person" are rarely if ever viewed as wholly distinct from those of its flesh-and-blood owners and managers. This can be true even in the case of large multi-national corporations. Tom Keane, *Without Jobs, It Won't Be The Same*, The Boston Globe, Aug. 30, 2011 at 11 (remarking that Apple—currently the world's most valuable corporation—was personified by "real flesh-and-blood man" that was Steve Jobs). It is undoubtedly so in the case of closely held corporations like Hobby Lobby, Mardel, and Conestoga.

B. Individuals Often Engage in the Exercise of Religion When Managing Corporate Affairs.

The personal dimension of "corporate" activity is also why people feel compelled to conduct a corporation's affairs in accordance with their *individual* religious beliefs. Because (1) many religious individuals believe that their faith must align with their professional activities, and (2) an act on behalf of a corporation is also a personal act by an individual, it follows that many religious persons believe that they are *personally* restrained from taking certain actions through their corporations. Indeed, for many corporate owners, directors, and officers, "the corporation is the venue in which he or she will, in all likelihood, work out his or her fruition as a human being." Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 Wash. & Lee L. Rev. 3, 57 (2012). "It is at work, which will consume most of the waking hours of his life, that the [corporate] officer will most

likely make the daily decisions that will form him into the person he will ultimately become." *Id.* at 57-58.

Again, this Court's case law is instructive. The Orthodox Jews in *Braunfeld* believed that their faith prevented them from opening their "places of business" on the Sabbath. It strains credulity to think that their religious beliefs would have been any different—or the constitutional protections for those beliefs less robust—had the businesses they owned been organized as corporations, rather than sole proprietorships. *See Braunfeld*, 366 U.S. at 601 ("Orthodox Jewish faith . . . *requires* the closing of . . . places of business and a *total* abstention from *all* manner of work from nightfall each Friday until nightfall each Saturday." (emphases added)). Similarly, the Jehovah's Witness in *Thomas* "claimed his religious beliefs prevented him from *participating* in the production of war materials." *Thomas*, 450 U.S. at 709 (emphasis added). Had the Jehovah's Witness controlled—rather than worked at—a steel-fabrication corporation, he presumably would have had the same obligation to prevent that company from producing weapons.

For the devout, faith may dictate the contours of a number of corporate activities. As an initial matter, many for-profit corporations exist for expressly religious purposes. Take, for example, a rabbi who "starts a business preparing kosher matzo," and thereafter chooses to "limit his personal liability . . . by converting it to a sole-shareholder corporation." *Hobby Lobby*, 723 F.3d at 1148 (Hartz, J., concurring). That rabbi would feel personally obligated to manufacture his product in accordance with kosher practices, even after incorporating his business. Similarly, faith informs the daily work of religious individuals who—through their

corporations—sell halal meat, bake communion wafers, or manufacture any type of sacramental item.

Moreover, many religions impose rules and restrictions on business practices. The Islamic doctrine of *riba*, for example, prohibits "illegitimate gain" in a transaction, while *gharar* prohibits both "significant uncertainties in a contract" and "the sale of an item not currently in existence." Haider Ala Hamoudi, *Muhammad's Social Justice or Muslim Cant?: Langdellianism and the Failures of Islamic Finance*, 40 Cornell Int'l L.J. 89, 110, 114-15 (2007). A religious Muslim who controls a corporation may therefore feel personally obligated to avoid entering into corporate contracts that implicate *riba* or *gharar*. In a similar vein, the Book of Leviticus—sacred to both Jews and Christians—provides: "If you sell anything to your neighbor or buy anything from him, neither of you is to exploit the other." Leviticus 25:14. So a devout Christian or Jew would presumably strive to avoid entering into exploitative corporate transactions.

Faith may also dictate the *moral* decisions an individual makes on behalf of a corporation. Corporations regularly face moral choices—related to the products they make and sell, their honesty in advertising, and their competitive practices.[3] Perhaps

---

[3] There is nothing inherent about the corporate form that prevents a for-profit corporation (which is to say, the individuals *controlling* the corporation) from making decisions based on ethical, rather than fiscal concerns. Indeed, the American Law Institute's Principles of Corporate Governance provide that a corporation "[m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business"—"*[e]ven if* corporate profit and shareholder gain are not thereby enhanced." American Law Inst., *Principles of Corporate*

most crucially, corporations must make moral decisions regarding their employees' "quality of life and quality of work." Daniel J.H. Greenwood, *Enronitis: Why Good Corporations Go Bad*, 2004 Colum. Bus. L. Rev. 773, 843-44 (2004). These decisions implicate wages, "health and safety, hours that allow for families . . . [and] support in sickness and old age and for dependents." *Id.* Such moral choices squarely implicate religious teachings. In a 1991 encyclical, for example, Pope John Paul II directed business "firms" to help ensure "that the basic needs of the whole of society are satisfied," instructing the faithful:

> [T]he purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a *community of persons* who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society. Profit is a regulator of the life of a business, but it is not the only one; *other human and moral factors* must also be considered which, in the long term, are at least equally important for the life of a business.

Pope John Paul II, Centesimus Annus, *On The Hundredth Anniversary of Rerum Novarum*, ¶ 35 (1991) (emphasis in the original). Similarly, the Jewish Talmud is replete with teachings regarding a just and equitable employer-employee relationship. *See generally* Gordon Cohn & Hershey H. Friedman, *Improving Employer-Employee Relationships: A*

Governance: Analysis and Recommendations: § 2.01 The Objective and Conduct of the Corporation (1994) (emphasis added).

Biblical and Talmudic Perspective on Management, 40 Management Decision 955 (2002).

Indeed, it is inevitable that religion—which provides the guiding moral force in so many people's lives—will inform how corporate decision-makers address the various issues affecting their businesses. Recent examples abound:

- Chick-fil-A, a chain of fast-food restaurants, closes "all of its 1,700-plus restaurants on Sunday" at the direction of its founder and longtime CEO Truett Cathy. *See* Fact Sheets, *Chick-fil-A's Closed-on-Sunday Policy*, *available at* http://www.chick-fil-a.com/Pressroom/Fact-Sheets/sunday_2012 (last visited Jan. 23, 2014). Mr. Cathy—a devout Baptist—not only refuses to "deal with money on the 'Lord's Day,'" he believes it is important to give "employees Sunday off as a day for family, worship, fellowship or rest." *Id.*

- At the direction of its CEO and controlling shareholder Jeff Swartz, the apparel company Timberland severed ties with a Chinese factory owner "to remediate the violations to human dignity that underscore its business model." Mark Borden & Anya Kamenetz, *Timberland's Jeff Swartz on Corporate Responsibility*, FAST CO., September 1, 2008 at 129. Mr. Swartz, an observant Jew, attributed that decision to his faith, noting "[i]t says in the Hebrew Bible one time that you should love your neighbor as yourself, but it says dozens of times that you shall treat the stranger with dignity." *Id.*

- Under the management of founder and former CEO David Neeleman, JetBlue maintained a rigidly egalitarian structure. The airline offered

> no first-class seats, sold all tickets for the same price, and referred to all employees as "crew members." Mr. Neeleman himself donated his entire yearly salary to a fund for employees. Mr. Neeleman attributed these decisions to his Mormon faith and mission, explaining that his "missionary experience obliterated class distinction for me," teaching him "to treat everyone the same." Jeff Benedict, The Mormon Way of Doing Business: Leadership and Success Through Faith and Family 4 (2007) (internal quotation marks omitted).

Plainly, then, individuals who direct the affairs of a corporation do not check their beliefs at the boardroom door. And just as plainly, these individuals engage in the personal exercise of religion when they take an action they believe is compelled by faith. This is true even though (as a matter of legal fiction) their action is also attributed to the corporation.

All of this reinforces the notion that laws directed at corporations can constitute a "substantial[ ] burden" on an *individual's* exercise of religion under RFRA. *See* 42 U.S.C. § 2000bb-1(a)–(b). And while it is true that individuals—in a rigidly technical sense—are burdened only indirectly by laws binding their corporations, that is of no legal moment in the free exercise context, especially as it pertains to the closely held corporations whose cases are before the Court. It is well-established that "[w]hile . . . compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 U.S. at 718.[4]

---

[4] The fear that this logic would allow a corporate *employee* to raise a RFRA claim is specious. *See* Brief for Petitioner at 30,

C. There Is Nothing Inherent in the Corporate Form that Requires Denial of the Personal Freedom to Direct the Affairs of a Corporation in Accordance with the Religious Beliefs of Its Owners.

Corporations are created "for certain specific purposes." Fletcher Cyclopedia § 7, at 19. But it is not one of the purposes of a corporation to eliminate the constitutional rights of those who form it. Nor does it advance any of the purposes of incorporation to deny the individual constitutional rights of the corporation's founders and owners to apply their religious convictions in the direction of corporate affairs.

To be sure, a corporation has "legal rights, obligations, powers, and privileges *different from*" those who own the corporation and direct its affairs. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (emphasis added). But that does not mean that those who control the corporation have no rights and obligations at all. Individuals have obligations under the

---

Sebelius v. Hobby Lobby, No. 13-354 (2014). When a corporate employer directs an employee to do something, it is the *corporation* that imposes that requirement. This is true even if a corporation instructs an employee to do something in response to a government mandate (e.g., "file these taxes" or "ready the premises for a safety inspection.").

If an employee objects to an instruction on religious grounds, the corporate employer can usually accommodate those objections—for example, by reassigning a particular duty to a different employee. Indeed, Title VII of the Civil Rights Act affirmatively *requires* employers to make reasonable accommodations for religious objections, *see* 42 U.S.C. § 2000e(j), thus protecting employees' free exercise rights. But the owner of a closely held corporation cannot reassign—or otherwise avoid—a mandate imposed on his business. As explained, such laws ineluctably require a corporate owner to act, and may therefore burden his personal free exercise rights.

law when they act in a corporate capacity. They can be charged, for example, with mail and wire fraud, 18 U.S.C. §§ 1341 & 1343, false statements, *id.* § 1001, and securities violations, 15 U.S.C. § 77*l*(a)(1), (2); *id.* § 77q.[5] They can be sued civilly as well—for libel and other personal injury, for example—based on statements made or actions taken in their corporate capacity. *See* Fletcher Cyclopedia § 4898. Individuals also have personal rights that penetrate the corporate form—including, for example, the right to invoke their personal privilege against self-incrimination when questioned about conduct undertaken on behalf of the corporation. *See Braswell v. United States*, 487 U.S. 99, 105, 118 (1988) (although "a corporation has no Fifth Amendment privilege," and a corporate custodian of documents must therefore produce incriminating documents on behalf of a corporation, "the Government . . . may make no evidentiary use of the '*individual* act' against the *individual*." (emphases added)).

There is simply no logical nexus between the secular purposes for which incorporation is permitted and the denial of the individual right to conduct corporate affairs in accordance with one's religious beliefs. There is, in short, no reason why a person who wishes to direct the affairs of his business in accordance with his religious beliefs should forfeit that right merely because he

---

[5] *See also* Robert Steinbuch, *The Executive-Internalization Approach to High Risk Corporate Behavior: Establishing Individual Criminal Liability for the Intentional or Reckless Introduction of Excessively Dangerous Products or Services into the Stream of Commerce*, 10 N.Y.U. J. Legis. & Pub. Pol'y 321, 350-53 & app. (2007) (surveying various state and federal laws imposing personal liability on individual corporate executives).

chooses to organize his business in the form of a corporation.

In fact, it would seriously undermine the individual and societal interests served by the laws of incorporation to impose a religious price on the act of invoking them. The Court recognized long ago that "[c]orporations are a necessary feature of modern business activity, and . . . ha[ve] become the source of nearly all great enterprises." *Hale v. Henkel*, 201 U.S. 43, 76 (1906). The advantages of the corporate form are well known—and essential to the ability of individuals meaningfully to participate in any complex commercial activity. By creating a corporate entity, its founders ensure that their personal assets are shielded from business losses. Fletcher Cyclopedia § 31. This gives entrepreneurs the freedom to enter new markets, to take needed commercial risks, and to expand their businesses without risking their own livelihood. Limited financial liability also helps corporations to raise capital, as investors—quite naturally—seek to shield their "personal asset[s] from the risk[] inherent in business." 1 William M. Fletcher Corporation Forms Annotated § 1:8 (5th ed. West 2014).

For these reasons, corporations have become "prominent and important in the business world." Fletcher Cyclopedia § 7.10, at 28. Indeed, the economy as we know it would not exist without the corporate form. As one economic historian puts it, corporations

> made it possible to build lasting institutions. Investments could be made in long-lived and specialized physical assets, in information and control systems, in specialized knowledge and routines, and in reputation and relationships, all of which could be sustained even as individual participants in the enterprise came and went. And these business

> institutions, in turn, could accomplish more toward the improvement of the wealth and standard of living of their participants in the long run than the same individuals could by holding separate property claims on business assets and engaging in a series of separate contracts with each other.

Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. Rev. 387, 454 (2003).

None of these individual and societal interests is advanced by forcing individuals to choose between the secular benefits of incorporation and their personal right to religious freedom.

D. RFRA Protects the Free Exercise of Religion in the Corporate Setting.

RFRA cannot be interpreted to apply only to the free exercise of religion in an unincorporated business setting, for at least two reasons. *First*, such an interpretation of RFRA is without support in the language or history of RFRA—and inconsistent with Congress's evident purpose to expand religious freedom. *Second*, there would be serious questions about the constitutionality of any law that purported to differentiate between the free exercise rights of those who seek the civil benefits of incorporation and the free exercise rights of those who do not.

1. There is no indication that Congress intended to restrict the forms of free exercise that it protects.

As an initial matter, the government points to nothing in the language or history of RFRA to suggest that individuals surrender their rights under the statute when they choose to incorporate a business. RFRA broadly, and without qualification, protects the "exercise

of religion." 42 U.S.C. § 2000bb-1. And as demonstrated above, religion may be exercised in any business setting, corporate or otherwise.

In enacting additional protection for the "exercise of religion," Congress surely understood that religious people do not separate their personal and religious lives. Congress also surely understood that under this Court's decisions, free exercise rights extend to one's conduct in the workplace. Had Congress intended to cover only the exercise of personal religious freedom in unincorporated businesses, it presumably would have provided some indication of that intent.

Indeed, it would have been incongruous for a Congress that was expanding protection for free exercise rights to deny that expanded protection to rights exercised in a corporate setting. For such a scheme would place enormous pressure upon persons of faith to forgo the benefits of incorporation—benefits that are, as explained above, indispensable in the modern world.

If enjoyment of RFRA's protection of religious freedom were conditioned on the forfeiture of the benefits of incorporation, a devout businessperson would be faced with an untenable choice. On the one hand, she might incorporate—but risk being forced to engage in activity that contradicts her deeply held religious beliefs. Under such a regime, a religious businessperson would have to simply accept, *a priori*, that the government could compel her corporation to take action repugnant to her personal faith. A corporation founded and controlled by devout Muslims might be forced to engage in financial transactions that are *riba* or *gharar*. A corporation founded and controlled by a Jehovah's Witness might be compelled by the government to engage in the production of armaments. *Cf. Thomas*, 450 U.S. at 709. Or the government could force all incorporated bakeries

to prepare their goods in a certain (non-kosher) manner—thus essentially saying to the matzo-baking rabbi: "'Since you have acted to reduce your personal financial risk, you can now be required to stop making kosher matzo.'" *Hobby Lobby*, 723 F.3d at 1148 (Hartz, J., concurring) (citation omitted). And because the religious founders of these corporations had—by hypothesis—relinquished their personal, work-related free exercise rights, they would be foreclosed from so much as raising a challenge to these government actions.

On the other hand, a religious entrepreneur might choose not to incorporate. In this scenario, she would stay true to deeply held religious principles and beliefs, and retain the ability to raise a free exercise claim against onerous government regulation. But the retention of these liberties would come at a steep price. Without limited liability, the entrepreneur's personal assets would be at risk. She would have greater difficulty raising capital. And in the end, the unincorporated business might be squeezed out by competitors—not based on merit, but based on the legal and tax advantages available to its corporate competitors.

There is simply no reason to assume that Congress intended to force individuals to choose between the benefits of civil incorporation and the full scope of religious freedom that RFRA enacted.

2. Interpreting RFRA to exclude free exercise rights in the corporate context would present serious constitutional questions.

Even if it were possible to read RFRA in a way that distinguishes between those who incorporate and those who do not, the Court should avoid that interpretation because it "would, at least, raise a grave and doubtful constitutional question" as to whether Congress has the

power to draw such a distinction in the first place. *Missouri Pac. R.R.. v. Boone*, 270 U.S. 466, 471-72 (1926).

RFRA, of course, provides a layer of protection to free exercise rights beyond that required by the Constitution, as interpreted in *Employment Division v. Smith*, 494 U.S. 872 (1990). But that does not mean that the Constitution would permit Congress to distinguish the level of protection afforded actors in the corporate and non-corporate spheres. For such a law would be neither religiously "neutral" nor "generally applicable." *Id.* at 880. It would not be religiously neutral, because it would draw explicit distinctions in the level of protection offered to the free exercise of religion in different contexts. And it would not be generally applicable, because its benefits would only be available in the business context to those who maintain unincorporated enterprises.

The government has offered no compelling interest that would justify providing less robust protection to the free exercise rights of those who choose the benefits of civil incorporation. And in the absence of anything in the text or history of RFRA indicating that Congress intended that result, the Court should not invite the constitutional questions that such an interpretation would raise.

CONCLUSION

Free exercise rights are not absolute. But neither are they eradicated when individuals choose to organize their businesses in the form of a corporation. This Court should acknowledge, therefore, that compulsion directed at a corporation—in particular, a closely held corporation—can amount to a substantial burden on the free exercise rights of those who own the corporation and direct its affairs.

Respectfully submitted.

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

KEVIN T. BAINE
Counsel of Record
EMMET T. FLOOD
C.J. MAHONEY
ELI SAVIT
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kbaine@wc.com

JANUARY 28, 2014